80-744

Supreme Court, U.S.
FILED
NOV 10 1980
MICHAEL RODAK, JR., CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RAYMOND ALVIN ARCINIEGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERRY L. NEWTON

433 North Camden Dr.
Suite 1200
Beverly Hills, Ca.
90210

(213) 274-8274

Attorney For Petitioner
RAYMOND ALVIN ARCINIEGA

BROWN AND NEWTON
Attorneys at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RAYMOND ALVIN ARCINIEGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERRY L. NEWTON

433 North Camden Dr.
Suite 1200
Beverly Hills, Ca.
90210

(213) 274-8274

Attorney For Petitioner
RAYMOND ALVIN ARCINIEGA

BROWN AND NEWTON
Attorneys at Law

QUESTIONS PRESENTED

1. Does the selective recordation of witnesses and evidence taken before the grand jury violate due process of law, and is the opinion of the Ninth Circuit Court of Appeals in this case in conflict with the rule of law established by the Third Circuit Court of Appeals in United States v. Crutchley, 502 F.2d 1195 (1974)?

2. Was the verdict as taken and entered by the trial judge coercive and in violation of Rule 31(d) of the Federal Rules of Criminal Procedure?

TOPICAL INDEX

	Page
QUESTIONS PRESENTED	i
Table Of Authorities	ii
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1-15
OPINION BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE FACTS	3-10
REASONS FOR GRANTING THE WRIT	10
ARGUMENT	10-15
A. The Opinion Of This Court Is In Conflict With The Third Circuit And Not Supported By Prior Decisions Of This Court	10-13
B. The Manner By Which The Jury Verdict Was Obtained Was Coercive In Nature And In Violation Of Rule 31(d), Federal Rules of Criminal Procedure	13-15

TOPICAL INDEX

	Page
CONCLUSION	15
APPENDIX A -- Memorandum Filed August 4, 1980	
APPENDIX B -- Order Filed October 9, 1980	

TABLE OF AUTHORITIES

United States v. Crutchley, 502 F.2d 1195 (1974)	i,10, 12
United States v. Solimine, 536 F.2d 703, 707 n.9 (1976)	12
United States v. Antonick, 481 F.2d 935, cert. denied 414 U.S. 1010 (1973)	13
United States v. Sexton, 456 F.2d 961 (5th Cir. 1972)	15
United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970)	15
Mathews v. United States, 252 A.2d 505 (D.C. Ct.App. 1969)	15

Statutes

28 U.S.C. §1254(1)	2

TABLE OF AUTHORITIES

Page

Rules

Rule 31(d), Federal Rules of Criminal Procedure i,3,14

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RAYMOND ALVIN ARCINIEGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner RAYMOND ALVIN ARCINIEGA respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in

this proceeding on August 4, 1980. The order denying the Petition For Rehearing In Banc in the United States Court of Appeals for the Ninth Circuit was filed on October 9, 1980.

OPINION BELOW

The opinion of the Court of Appeals appears as Appendix A hereto. A copy of the Order denying the Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 4, 1980. A timely Petition For Rehearing And Suggestion For Rehearing In Banc was denied on October 9, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 31(d) of the Federal Rules of Criminal Procedure provides:

> "(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

STATEMENT OF THE CASE

The Petitioner, RAYMOND ALVIN ARCINIEGA, was convicted on June 7, 1979, of conspiring to import and distribute cocaine. On July 11, 1979, the Petitioner was sentenced to 12 years imprisonment. Petitioner is presently incarcerated at Federal Correctional Institute, Terminal Island, California.

The Petitioner was originally arrested of these charges on August 24, 1978. The charges against Petitioner were

dismissed on September 13, 1978, in order to allow the Government more time to investigate the case and present it to the grand jury. On November 7, 1978, and February 20, 1979, the Government subpoenaed before the grand jury, various associates of the Petitioner. The testimony of these witnesses were transcribed. Thereafter, on March 6, 1979, the Government called to the grand jury a Special Agent of the Drug Enforcement Administration, to summarize in hearsay fashion, the testimony of a cooperating co-defendant. This testimony was not recorded or transcribed by the grand jury. Following the appearance before the grand jury of this case agent, a true bill of indictment was returned against the Petitioner.

At trial, the only direct evidence against Petitioner was the testimony of the cooperating co-defendant. On June 7, 1979, the jury indicated that it had reached a verdict, and the following colloquy occurred when the trial court, on its own motion, polled the jury:

> "THE COURT: If you will poll the jury, please, Miss Kato.
>
> THE CLERK. Joyce Stroops, is the verdict as presented and read your verdict?
>
> JUROR NO. 1: Yes, it is. I had a question. When you consider a party as guilty, does that make him guilty of the whole case, or guilty of conspiracy? Does it break down into parts?
>
> THE COURT: Well, the verdict said guilty on all three counts. Is your verdict guilty on all three counts?

JUROR NO. 1: Yes" (R.T. 229). 1/

[Thereafter, the remaining jurors were polled and the Court returned to Juror No. 1]

"THE COURT: Mrs. Stroops, I want to make sure now that your verdict, your vote, is guilty on all three counts.

JUROR NO. 1: I did vote guilty on all three counts, but I said I did have questions, but I talked to the jury about that and I was just wondering, was that an overall of the whole case guilty? Because I remember asking them about the different steps, you know. I thought maybe intent of conspiracy was a case of guilty. I agree on intent to conspiracy.

THE COURT: What about the other two counts?

JUROR NO. 1: The other two counts I believe follows the first count of conspiracy overall, the whole thing; right?

1/ "R.T." refers to the Reporter's Transcript of Record.

THE COURT: Well, no. The other counts are different than conspiracy, and you have to judge the guilt or innocence on all three counts and you have to consider each count separately.

You have to consider guilt or innocence of conspiracy, you have to consider guilt or innocence on the importation, which is Count Two and guilty or innocence on the possession.

Was that the three counts?

MR. KRAMER: Yes, your Honor.

THE COURT: All right.

MR. KRAMER: Possession with intent to distribute.

THE COURT: Possession with intent to distribute. And the elements of all three crimes are different. Just because he is guilty of conspiracy doesn't mean he is guilty of the other two counts.

JUROR NO. 1: I see.

Well, I agreed.

THE COURT: So your verdict is guilty of the conspiracy, and your verdict is guilty on the importation?

JUROR NO. 1: And I'm puzzled about the importation. Does that mean that this party imported--

THE COURT: All right.

Is there any question, however, any question at all, that you voted for guilty on the conspiracy?

JUROR NO. 1: Guilty with intent of conspiracy, there is no question.

THE COURT: No question about the guilt on Count One, the conspiracy charge as I read it to you?

JUROR NO. 1: No question.

THE COURT: Well, we can send the jury back on Counts Two and Three or else the court can declare a mistrial on it, Mr. Kramer.

MR. KRAMER: Could I have a moment, your Honor?

THE COURT: Yes.

(Mr. Kramer conferred with Mr. Sayers).

MR. KRAMER: Your Honor, the government's position is that the juror was voting guilty on all three counts and --

MR. NEWTON: Your Honor, may I interpose an objection in terms of that kind of argument?

THE COURT: Well, just let him argue. I'm not agreeing just because he's arguing, and I haven't agreed with him yet.

MR. NEWTON: I'm thinking about the impact his argument is going to have on the jury when they go back.

THE COURT: Well, I am not going to let them go back in.

MR. KRAMER: We would request that you accept the verdict on all three counts.

THE COURT: No. You weren't listening to what Mrs. Stroops has been saying at all.

MR. KRAMER: Your Honor, then we would request that you

accept the guilty verdict on Count One.

THE COURT: All right.

The court will accept the guilty verdict on Count One. There is no verdict as to Counts Two and Three." (R.T. 231-233)

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit Court of Appeals allowing selective recordation of witnesses before the grand jury is in violation of the due process clause of the Fifth Amendment and in conflict with the rule of law established by the Third Circuit Court of Appeals in United States v. Crutchley, 502 F.2d 1195 (1974).

ARGUMENT

A. The Opinion Of This Court Is In Conflict With The Third Circuit And Not Supported By Prior Decisions Of This Court

Selective recordation of evidence taken before the grand jury is the first

issue raised by this Petition. In the case at bar, the Government recorded the testimony of certain witnesses favorable to the defense. After obtaining this exculpatory testimony, the Government presented its case to the same grand jury through the unrecorded hearsay testimony of the arresting officer. The key witness, an accomplice and informant, was not called upon to testify before the grand jury. This issue was raised pre-trial by a timely motion to dismiss.

At trial, the Government was in a position to impeach defense witnesses with their grand jury transcripts, while the defense did not have the same opportunity with respect to the testimony of the accomplice and informant, due solely to the Government's decision to record some, but not all, of the presentation

before the grand jury. This practice was condemned by the Third Circuit Court of Appeals in United States v. Crutchley, supra. It likewise appears that the Sixth Circuit condemns such a practice. United States v. Solimine, 536 F.2d 703, 707 n.9 (1976).

The Ninth Circuit's opinion on this issue states simply that the prior opinion of this Court in United States v. Antonick, 481 F.2d 935, cert. denied, 414 U.S. 1010 (1973), requires rejection of the rule in Crutchley, supra.

> "The appellant's position is that while the government need not transcribe all the testimony before a grand jury, if it transcribes some it must transcribe all; and that in this case failure to transcribe was prejudicial to appellant. We have previously, and do again reject appellant's argument." Antonick, supra, at 937.

However, the above-quoted passage cites as its authority the Ninth Circuit case of United States v. Parker, 428 F.2d 488, 489-90 (1970). And, the Parker decision dealt only with the issue of recordation, and not selective recordation. Thus, the decision in Antonick is not dispositive or controlling on the question of selective recordation and the quoted passage appears to be dicta. It should, therefore, not be controlling on the issue raised by this petition.

B. The Manner By Which The Jury Verdict Was Obtained Was Coercive In Nature And In Violation Of Rule 31(d), Federal Rules Of Criminal Procedure

As the Ninth Circuit's opinion indicates, Juror No. One was confused when the jury was polled following the return of its verdict. Rather than state unequivocally that she found the defendant

guilty of conspiracy, she stated on more than one occasion that the defendant was guilty of intent of conspiracy, only one of the elements of that crime.

Rule 31(d) of the Federal Rules of Criminal Procedure clearly contemplates that in such situations, the jury should retire for further deliberations or be discharged. The idea of a colloquy between judge and jury as to what the juror's verdict is, given the obvious confusion of this juror, is not consistent with the jury process. At the very least, the element of intimidation is added to the decision making process by such questioning. The Court's finding that the juror was not confused and clearly expressed an opinion of guilt on the conspiracy count is not consistent with the juror's repeated statement that she found the

defendant "guilty of intent to conspiracy".

The Court's colloquy, however well intended, was coercive inasmuch as it required Juror No. One to deliberate and decide the Petitioner's fate in open court. As such, the verdict cannot stand. United States v. Sexton, 456 F.2d 961 (5th Cir. 1972); United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970); and Mathews v. United States, 252 A.2d 505 (D.C. Ct.App. 1969).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JERRY L. NEWTON
Attorney For Petitioner

BROWN AND NEWTON
Attorneys at Law

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND ALVIN ARCINIEGA, Defendant-Appellant.	No. 79-1512 MEMORANDUM

Filed: Aug. 4, 1980
Richard H. Deane, Clerk
U.S. Court of Appeals

Appeal from the United States District Court For The Central District of California

Before: GOODWIN and ANDERSON, Circuit Judges, and EAST,* District Judge

The defendant-appellant (Arciniega) appeals his judgment of conviction and sentence to custody for 12 years and a 25 year special parole term for conspiring to

---

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

import cocaine, 21 U.S.C. §§963 and 960 (a)(1). He raises three issues on appeal. We affirm.

It appears from the record that two associates of Arciniega appeared before the grand jury in November of 1978 and February of 1979. Their testimony was recorded and transcribed by the Government. On March 6, 1979, a Special Agent of the Federal Bureau of Investigation appeared before the grand jury and summarized the testimony and evidence against Arciniega. The Special Agent's testimony was not recorded or transcribed by the Government.

Arciniega urges that the Government's selective recording of a part, but not all, of the testimony before the grand jury constitutes reversible error. This issue has been decided adversely to Arciniega in United States v. Antonick,

481 F.2d 935 (9th Cir.), cert. denied, 414 U.S. 1010 (1973), wherein this Court stated at 937:

> "The appellant's position is that while the government need not transcribe all the testimony given before a grand jury, if it transcribes some it must transcribe all; and that in this case failure to transcribe was prejudicial to appellant.
>
> "We have previously, and do again, reject appellant's argument."

Accordingly, we reject Arciniega's first claim for reversal.

Arciniega's second claim is that he was denied the right to a speedy trial. In this connection, he does not claim that the Government's action violated the Speedy Trial Act, 18 U.S.C. §§1361, et seq., but only claims that the delay prejudiced his Sixth Amendment rights. The facts are: Arciniega was arrested and a complaint filed on August 25, 1978, but on

the Government's motion, the complaint was dismissed on September 13, 1978. On March 6, 1979, Arciniega was indicted by a federal grand jury, and on June 5, 1979, the trial commenced. No rationale was presented by Arciniega as to how he was prejudiced by the ten months from arrest to trial. We reject the second claim for reversal. Barker v. Wingo, 407 U.S. 514 (1972). See also United States v. Tercero, No. 78-1995, slip op. at 1784-85 (9th Cir. Jan. 18, 1980).

Arciniega's third claim is that the District Court erred in its handling of the confusion of one juror regarding her verdict. The indictment alleged and Arciniega was tried on three counts: conspiracy to import and possess with intent to distribute a narcotic drug, importation of a narcotic drug, and possession

with intent to distribute a narcotic drug. On June 7, 1979, the jury returned a verdict of guilty on all three counts. The District Court, on its own motion, then polled the jury resulting in the following exchange:

> "THE COURT: If you will poll the jury, please, Miss Kato.
>
> "THE CLERK: Joyce Stroops, is the verdict as presented and read your verdict?
>
> "JUROR NO. 1: Yes, it is. I had a question. When you consider a party as guilty, does that make him guilty of the whole case, or guilty of conspiracy? Does it break down into parts?
>
> "THE COURT: Well, the verdict said guilty on all three counts. Is your verdict guilty on all three counts?
>
> "JUROR NO. 1: Yes."

The remaining jurors were then polled and they all agreed with the verdict. The trial judge then said:

"THE COURT: Mrs. Stroops, I want to make sure now that your verdict, your vote, is guilty on all three counts.

"JUROR NO. 1: I did vote guilty on all three counts, but I said I did have questions, but I talked to the jury about that and I was just wondering, was that an overall of the whole case guilty? Because I remember asking them about the different steps, you know. I thought maybe intent of conspiracy was a case of guilty. I agree on intent to conspiracy.

"THE COURT: What about the other two counts?

"JUROR NO. 1: The other two counts I believe follows the first court of conspiracy overall, the whole thing; right?

"THE COURT: Well, no. The other counts are different than conspiracy, and you have to judge the guilt or innocence on all three counts and you have to consider each count separately.

"You have to consider guilt or innocence of conspiracy, you have to consider guilt or innocence on the importation, which is Count Two, and guilty of innocence on the possession.

"Was that the three counts?

"MR. KRAMER: Yes, your Honor.

"THE COURT: All right.

"MR. KRAMER: Possesstion with intent to distribute.

"THE COURT: Possession with intent to distribute. And the elements of all three crimes are different. Just because he is guilty of conspiracy doesn't mean he is guilty of the other two counts.

"JUROR NO. 1: I see. Well, I agreed.

"THE COURT: So your verdict is guilty of the conspiracy, and your verdict is guilty on the importation?

"JUROR NO. 1: And I'm puzzled about the importation. Does that mean that this party imported--

"THE COURT: All right. Is there any question, however, any question at all, that you voted for guilty on the conspiracy?

"JUROR NO. 1: Guilty with intent of conspiracy, there is no question.

"THE COURT: No question about the guilt on Count One, the conspiracy charge as I read it to you?

"JUROR NO. 1: Right.

"THE COURT: No question in your mind now?

"JUROR NO. 1: No question.

The District Court then entered a guilty verdict as to count one of the indictment, the conspiracy count, and declared a mistrial on counts two and three.

Arciniega claims that the District Court should have returned the jury to deliberations so that the juror could have resolved her doubts and confusions. In addition, Arciniega claims that the District Court repeatedly tried to get the juror to acknowledge a finding of guilty. To support this argument, Arciniega has cited a number of cases in which the District Court mishandled a juror's

hesitation about a verdict. United States v. Sexton, 456 F.3d 961 (5th Cir. 1972); United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970); and Mathews v. United States, 252 A.2d 505 (D.C. Ct.App. 1969). All of these cases are distinguishable from this case because of the care taken by the District Court to determine the nature of the juror's confusion, and also because the juror was not confused about her verdict on the conspiracy count.

In McCoy, Sexton, and Mathews, the juror had answered the poll with an ambivalent response, and the District Court had responded by demanding a guilty or not guilty response. On appeal, the convictions were overturned because of the probability that the verdict had not been unanimous and also that the District Court may have forced a guilty verdict from the

juror. The proper procedure was to return the jury to deliberations so that the uncertain juror could reach a decision and not have to vote in open court.

The circumstances in this case were different. The juror clearly exporessed a verdict of guilty as to the conspiracy count and was only confused as to the importation and possession counts. On the conspiracy count, the District Court did not force the juror to vote guilty nor force the juror to vote in open court. Any prejudice caused by the questioning of the juror about her verdict would only apply to the importation and possession counts, but the District Court did not accept a verdict on those counts. The jury clearly returned a unanimous verdict reached after full deliberations on the conspiaracy count.

Accordingly, we reject Arciniega's third claim for reversal.

The judgment of conviction should be affirmed.

In light of the decision in Bifulco v. United States, 48 U.S.L.W. 4734 (U.S. June 16, 1980), we, sua sponte[1/] hold that the District Court erred in imposint a special parole term for conviction of the conspiracy and the sentence of a 25 year special parole term must be vacated.

The judgment of conviction and sentence to custody for 12 years entered by the District Court on July 11, 1979 is affirmed. That part of the judgment of sentence to a 25 year special parole term is

---

1/ See 2 Wright, Federal Practice and Procedure §588 at 576 (1969).

vacated.

AFFIRMED IN PART AND VACATED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	No. 79-1512
v.	)	O R D E R
RAYMOND ALVIN ARCINIEGA, Appellant.	)	

Filed: Oct. 9, 1980
Richard H. Deane, Clerk
U.S. Court of Appeals

Before: GOODWIN and ANDERSON, Circuit Judges, and EAST,* District Judge

On August 19, 1980, appellant filed his petition for rehearing and suggestion for rehearing en banc.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion

---

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.